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Tennessee's Response to the Supreme Court's Decision

*The Honorable Paul G. Summers & Ms. Elizabeth Martin*¹

I. General Summers:

The State of Tennessee has conceded from the outset of the *Lane*² litigation that the Americans with Disabilities Act³ applies to it and that its obligation to comply with the ADA may be enforced by suits for injunctive relief and attorneys' fees under *Ex parte Young*.⁴ The only issue before the Supreme Court was whether or not an individual could seek money damages from the State for violations of the ADA. The Supreme Court held that the State could be sued for damages in cases where a violation of the constitutional right of access to the Courts was proven. The State's vulnerability to damages claims in other contexts remains an open question.

Because the State of Tennessee has always agreed that it must comply with the ADA, the impact of the Supreme Court's decision in *Lane* is of limited practical significance. The State of Tennessee has, and continues, to accommodate persons with disabilities and does not discriminate against persons with disabilities. Of course, Title II of the ADA is applicable to many other areas of state government in addition to the judicial program. A brief review of the cases filed against the State of Tennessee before and after the Supreme Court's decision in *Lane* reveals that there has not been an increase in the number of cases filed in all areas under Title II. Indeed, the number of cases alleging disability discrimination is not disproportionate to the number of cases filed against the

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² *Tennessee v. Lane*, 541 U.S. 509 (2004).

³ 42 U.S.C. §§ 12131-12300 (2005).

⁴ 209 U.S. 123 (1908).

State of Tennessee. That there has been no flood of damages claims in the aftermath of *Lane* provides at least circumstantial evidence for the proposition that the State's record of compliance is adequate in most respects.

Subsequent to the Supreme Court's decision in *Tennessee v. Lane*, the case was remanded to the U.S. District Court for the Middle District of Tennessee. A settlement was negotiated between the State and the plaintiffs. The settlement did not provide for damages by the State. It provided only for payment of attorneys' fees and that the State would take particular actions regarding access to the courts by disabled persons. As a practical matter, this outcome is exactly what plaintiffs could have obtained from the State had they sued under *Ex parte Young* for injunctive relief and attorneys' fees. As part of that settlement, and with input from plaintiffs and their lawyers, a specific policy was adopted by the Tennessee Supreme Court to make certain that the Americans with Disabilities Act was followed with regard to state court proceedings.

This policy applies to all parties and attorneys as well as to court personnel. A copy of that policy is provided. This policy does not add any additional obligations on the State of Tennessee but provides a process for insuring compliance with the ADA.

Because Tennessee's judicial program involves the intersection of state and local governments, the policy is significant in its attempt to address all issues. However, the burden of compliance remains on the governmental entity involved, for the most part, the counties. In addition, the Administrative Office of the Courts has implemented a training plan to insure that all judges—both state and local—as well as their assistants and clerks of courts are trained regarding the requirements of the Policy on Judicial Access. An ADA coordinator for access to the judicial program has been assigned for each county to assist persons with disabilities. This training has already begun.

Even before the commencement of the *Lane* case, most state court judges were working diligently to provide access to the courts for necessary parties. However, due to the unique nature of Tennessee's judicial system, including municipal, county and state courts and the use of county courthouses for state judicial proceedings, the courts' record of compliance was not always consistent. Most of the issues raised by the *Lane* litigation did not involve intentional discrimination.

In Tennessee, every county is required to provide a courthouse.⁵ However, there are no provisions for funding by the state and no requirements related to the physical facilities beyond the simple requirement that there be a courthouse and that it be located within the city limits of the county seat.⁶ But there are no provisions of state law allowing the state court judges to enforce the requirements of the ADA against the counties. Because the ADA allows local and state governments to use alternative locations rather than make extensive renovations, the policy on access to the judicial program allows relocation of judicial programs in order to comply with the ADA. This is not new, but is a clarification of the State's policy.

Many of the judges already used alternative locations. A number of the counties have made plans to renovate the courthouses or to build new courthouses or justice centers. This should alleviate problems involving access by individuals with disabilities as well.

The issue of alternative locations was a major issue in *Lane*. Mr. Lane's factual allegations in his complaint included a claim that he was offered an alternative location and he refused. Mr. Lane argued that the ADA required the State or County to provide an elevator with access to a second floor courtroom. While Mr. Lane has been successful in encouraging some counties to make physical

⁵ Tenn. Code Ann. § 5-7-104 (2005).

⁶ *Id.* § 5-7-105.

changes to their courthouses, the State has not agreed to provide or require physical changes if alternative locations can be used. Another issue raised by Plaintiffs was the State's requirement that a person with a disability needing an accommodation give reasonable notice to the Court in order to obtain the accommodation. Plaintiffs argued that this requirement was discriminatory.

The State disagreed and the policy ultimately agreed upon includes a notice requirement.

One positive outcome of the *Lane* lawsuit is that the Administrative Office of the Courts has recommended that Tennessee Code Annotated § 22-2-304 be amended. Subsection (c) of that statute currently provides that the names of all persons "known by the commissioners to have died or removed from the county or to have become mentally or physically disabled" drawn for jury service "shall be put aside and not used, and another name or names shall be drawn in its or their stead."⁷ The application of this statute was not raised by any of the plaintiffs. However, pending legislation deletes the requirement that the names of disabled persons be set aside and has been passed by the House (96-0). It will likely be approved by the Senate this legislative session.

Two statutes relating to jury duty remain on the books. First, Tennessee Code Annotated § 22-1-102(b) provides, "Persons not in the full possession of the senses of hearing or seeing shall be excluded from service on any jury if the court determines, of its own volition or on motion of either party, that such person cannot provide adequate service as a juror on such jury."⁸ This seems to be consistent with the ADA. In addition, Tennessee Code Annotated § 22-1-103 exempts certain persons and professions from jury service. The exemption includes

⁷ Tenn. Code Ann. § 22-2-304(c) (2005).

⁸ Tenn. Code Ann. § 22-1-102(b) (2005).

persons “disabled by bodily infirmity”⁹ and “persons not in the full possession of the senses of hearing or seeing.”¹⁰ However, this exemption does not excuse or prevent persons with disabilities from serving on a jury. It only exempts the person from the initial summons and allows the exempt person to choose the time frame for service.¹¹ This provision works well with the ADA Policy on Access to the Judicial Program because the exemption allows the prospective juror an opportunity to request any needed accommodation and gives the Court the opportunity to arrange for an accommodation such as an alternate location or interpreter.

Another point to consider in assessing the impact of *Lane* is to consider the impact of *Board of Trustees of the University of Alabama v. Garrett*¹² throughout state government. In *Garrett*, the Supreme Court held that individuals could not bring claims for money damages against the states for employment discrimination under Title I of the ADA. Subsequent to *Garrett*, however, the State of Tennessee continues to comply with the ADA in the employment area. There is a written policy forbidding disability discrimination in employment, an ADA coordinator at each agency, and oversight by the Tennessee Department of Personnel. Despite the fact that the State has immunity from claims for money damages arising from employment discrimination, the State continues to comply with the ADA.

⁹ Tenn. Code Ann. § 22-1-103(a)(5) (2005).

¹⁰ *Id.* § 22-1-103(a)(7).

¹¹ *Id.* § 22-1-103(c).

¹² 531 U.S. 356 (2001).

II. General Martin:

I will talk very briefly about the practical implications of *Lane* for the State of Tennessee. As General Summers pointed out, this case involved the judiciary, not the executive branch. That is where the main impact so far has been felt. We settled this case, and the settlement resulted in our paying attorneys' fees, agreeing to enter a policy that would address the issues of access to the court, and providing training for the judges, clerks, and the assistants to the court, to make sure the policy is implemented. The policy that we implemented is considered by a lot of people to be the blue ribbon policy. There were not very many out there. The problem in the judiciary is that it is a weird conjunction between states and counties. The courthouses are county courthouses. The Constitution in the State of Tennessee says the county has to provide a courthouse. The State has state court, but state court occurs in the courthouses supplied by the counties. But the State has no authority to make the counties do anything to their courthouses except have them. That puts the State in an awkward position.

The Administrative Office of the Courts has developed a policy that has been presented across the state. The Supreme Court of Tennessee has made this policy a rule, which applies to every attorney. Attorneys have the obligation to comply with the policy and make sure, if it is necessary, that they raise it before the judge. Attorneys just tell the judge they have a witness or plaintiff who needs to be in court, and the judge must provide accommodations under the rule. The rule is also applicable to a pro se parties. If a *pro se* party knows they need special accommodations, they have to ask for it.

Because of our unique position, some of the courthouses are very old. They are on the national historic register. They are impossible to renovate. There is simply no way to put an elevator in. We were not in a position to

ask the county to place elevators in their buildings. So we arrange for alternative locations, clearly allowed by the courts, with a little advanced notice. By allowing for alternative locations, we believe we have complied with Title II.

There are a few other policies which the State has adopted. One, the Administrative Office of the Courts submitted language to the legislature to change our jury statute so disability is not taken into account in creating a jury pool. That was not an issue in *Lane*, but it is a positive outcome because it raised the bar.

While disability is no longer a factor for creating juries, there is a statute which provides benefits for disabled persons from serving on juries. The statute, which applies to lawyers and doctors as well, allows people with disabilities to choose one week during the year that they are available to serve. This gives the court time to arrange an alternative location or interpreter in order to accommodate the person with a disability.

The statute also requires the judge to determine whether the disabled person can serve as a juror. The person's disability is only considered as it relates to the specific case that the person has been called to sit on the jury.

In 1999, I conducted one of the first training sessions for the clerks of the courts. Throughout the time that the ADA has been in effect, the State of Tennessee has been attempting to train judges, clerks, general sessions judges in how the ADA works. The State has also been making sure our courts are accessible. That training is continuing even now, and will continue for the next several years in order to make certain that all the judges are aware, and so our courts are, in fact, accessible to all persons including those with disabilities.

